Conversent Communications

Via Overnight Mail and Electronic Mail

April 25, 2005

Mary L. Cottrell, Secretary
Department of Telecommunications and Energy
One South Station
Boston, MA 02110

Re: Verizon Arbitration, D.T.E. 04-33

Dear Ms. Cottrell:

Conversent's Reply Brief is enclosed for filing.

Thank you. Please contact me (401-834-3326 direct dial or gkennan@conversent.com) if you have any questions.

Very truly yours,

Gregory M Kennan

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Director, Regulatory Affairs and Counsel

GMK/cw

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Service List (by electronic and first-class mail)

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Petition of Verizon New England Inc. for Arbitration of an Amendment To Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Massachusetts Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the *Triennial Review Order*	**D.T.E. 04-33**

CONVERSENT'S REPLY BRIEF

April 25, 2005

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CONVERSENT'S REPLY BRIEF

Introduction

The one hundred fifty pages of rhetoric in Verizon Massachusetts' ("Verizon") brief give the Department little reason to adopt Verizon's interconnection agreement amendment over that proposed by Conversent Communications of Massachusetts, LLC ("Conversent"). Conversent's proposals will better protect and promote competition, particularly in the market serving small businesses, which are so crucial to the Massachusetts economy. Verizon's proposals, on the other hand, would eliminate or greatly narrow its obligations under the pro-competitive provisions of the Act and Department policy. Consumers, especially small businesses, will suffer if the Department adopts Verizon's proposals. The Department should adopt Conversent's proposed amendment.

Discussion

Conversent reiterates the statements in our Initial Brief,[1] and in this Reply Brief responds specifically to certain of Verizon's contentions.

Issue No. 1

Should the Amendment include rates, terms, and conditions that do not arise from federal unbundling regulations pursuant to 47 U.S.C. sections 251 and 252, including issues asserted to arise under state law?

There is a simple answer to the question whether the amendment should contain references to unbundling requirements that go beyond the FCC's explicit, effective rules: "yes." The Department has already ruled on the issue. In the December 15, 2004 *Consolidated Order* in this case, the Department said: "We agree with CLECs that, where there is a gap, the Department would not be pre-empted from imposing unbundling requirements if state law provides that authority; but this is the case only so long as that exercise of authority is consistent with Section 251 and does not substantially prevent implementation of the Act." *Id.* at 23.

Accordingly, the Department should reject Verizon's proposed amendment, which restricts its unbundling obligations to those explicitly provided in 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51. Verizon's provisions allow no room for the Department to require unbundling. Instead, the Department should accept Conversent's proposal, which requires Verizon to provide unbundling to the extent required by applicable law.

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[1] Conversent also reiterates that it takes no position regarding whether the Department should require access to Local Switching, or any UNE Combination involving Local Switching, under §§ 251 or 271 of the Act or under state law. Notwithstanding the presence of provisions relating to Local Switching in the drafts that Verizon provided to Conversent, Conversent does not seek access to unbundled Local Switching or any combination involving unbundled Local Switching. Conversent's Proposed TRRO Amendment deletes provision relating to these elements from Verizon's proposals.

> Subject to the change of law provisions of this Amended Agreement and all other relevant provisions of this Amended Agreement, Verizon shall be obligated to provide access to unbundled Network Elements ("UNEs"), combinations of unbundled Network Elements ("Combinations"), or UNEs commingled with wholesale services ("Commingling"), to Conversent under the terms of this Amended Agreement pursuant to 47 U.S.C. § 251(c)(3), 47 C.F.R. Part 51 or other Applicable Law.

Conversent's Proposed TRRO Amendment, § 2.1. Other CLECs have proposed similar provisions.

Verizon's objections to Conversent's proposal are unfounded. It is important to keep in mind what Conversent's provision does and does not do. It does not require unbundling of any particular network elements, or circumvent such obligations, if any, the Department may have to assess impairment. What Conversent's amendment does is leave open the possibility that the Department may exercise state-law or other applicable authority to require unbundling in the future. So long as there is any state authority to require unbundling, no matter how narrow, the Department should accept Conversent's formulation.

In addition to being contrary to a prior Department ruling in this case, Verizon is wrong when it says, "Federal law does not allow the Department to 'fill the gap' in the first place." Verizon Brief at 19. Despite eight pages of argument to the contrary, Verizon has not shown a lack of authority. The cases cited by Verizon at most state that a state commission may not impose an unbundling requirement when such a requirement would be directly contrary to an FCC decision. *See Bell South Preemption Order,* quoted in Verizon Brief at 20-21. But Verizon cites no authority that the state commission may not order unbundling when there is an absence of federal law, such as when a court has vacated FCC regulations, or when the FCC has not addressed the issue. This is no surprise; the FCC has explicitly stated that state commissions have unbundling authority in those circumstances.

> In the absence of binding federal rules, state commissions will be required to determine not only the effect of this Court's ruling on the terms of existing agreements *but also the extent to which mass market switching and dedicated transport should remain available under state law.*

United States Telecom Association v. FCC, Motion of the Federal Communications Commission to Stay the Mandate Pending the Filing of Petitions for a Writ of Certiorari, May 24, 2004, at 9 (emphasis added). Verizon's argument that state commissions have no unbundling authority falls in the face of this explicit FCC statement.

Thus, Congress, the FCC, and the courts have not shut the door on all state commission authority to order unbundling. Verizon's proposed contractual language, tied explicitly to the authorities set forth in section 251(c)(3) and 47 C.F.R. Part 51, would require the Department to shut that door on itself. The Department should decline Verizon's invitation. It should adopt the language proposed by Verizon and other CLECs, which ties Verizon's unbundling obligations to "Applicable Law."

Issue No. 4

What obligations, if any, with respect to unbundled access to DS1 loops, DS3 loops, and dark fiber loops should be included in the Amendment to the parties' interconnection agreements?

Verizon misunderstands Conversent's proposal regarding the transition provisions applicable to DS-1 and DS-3 loops that Verizon is no longer required to unbundle. Contrary to Verizon's mistaken interpretation, Conversent does not propose to apply the transition provisions in non-impaired wire centers only to DS-1 and DS-3 loops below the applicable caps. In non-impaired wire centers, the transition provisions would be applicable to all DS-1 and DS-3 loops. Convesent Proposed Amendment, § 3.2.1.1.3. In impaired wire centers, where Verizon will still

be required to unbundled DS-1 and DS-3 loops, subject to the cap, the transition provisions will be applicable to loops that exceed the caps. § 3.2.1.1.5.

Issue No. 5

What obligations, if any, with respect to unbundled access to dedicated transport, including dark fiber transport, should be included in the Amendment to the parties' interconnection agreements?

Verizon recalcitrantly takes exception to Conversent's provision that applies the ten DS-1 cap on dedicated transport only on routes where DS-3 unbundling is not required. After admitting that paragraph 128 of the TRRO supports Conversent's proposal, Verizon treats ¶ 128 as a nullity and suggests that the Department ignore it.

This is absurd. Verizon's brief is full of quotations, references, and citations to the interpretive text of the TRRO and other FCC orders. *E.g.,* Verizon Brief at 6 n. 13, 7 n. 19, 13 n. 26, 26 n. 59, and many other places. Verizon does not hesitate to cite the interpretive text when in its favor. But here, where Verizon does not care for the FCC's interpretation of its own regulations, Verizon proposes simply to ignore it.

The Department may not simply ignore ¶ 128. The logical way to interpret the FCC's orders is to read the regulations and interpretive text together. The New York PSC recently faced this precise issue. It refused to ignore ¶ 128, and ruled that the 10-DS1 cap did not apply on routes where unbundled DS3s must be provided. *In re Ordinary Tariff Filing of Verizon New York Inc. to Comply with the FCC's Triennial Review Order on Remand,* Case No. 05-C-0203, Order Implementing TRRO Changes, at 13 (Mar. 16, 2005) ("NY TRRO Tariff Order") (copy at Appendix 1). The Department should come to the same conclusion, adopt Conversent's provision, and reject Verizon's.

Issue No. 9

What terms should be included in the Amendment's Definitions Section and how should those terms be defined?

Verizon improperly attempts to substitute its own definition of "fiber-to-the-premises (FTTP) loop" for the FCC's "fiber-to-the-home (FTTH)" and "fiber-to-the-curb (FTTC)" loops. Even though the FCC's order and regulations use the terms FTTH and FTTC, Verizon blithely states, "The correct term is 'fiber-to-the-premises' or 'FTTP.'" Verizon Brief at 56.

In a bit of wishful thinking, Verizon claims that the FCC's continued use of the term "fiber-to-the-home" "is a misnomer that perpetuates the inaccurate notion that a fiber loop is exempt from unbundling only if it serves a residence." *Id.* That notion is hardly inaccurate; it is what the FCC has said over and over again. In the TRO, MDU Reconsideration Order, FTTC Reconsideration Order, and TRRO, the FCC has repeatedly stated that the unbundling relief applies to fiber loops serving mass market, residential customers. *See* Conversent's Initial Brief at 20-26.[2]

The Competitive Carrier Coalition ("CCC") similarly suggests that the Department reject Verizon's FTTP definition in favor of a definition of FTTH, which confines FTTH loops to those serving mass market, residential customers. CCC Brief at 37, 49-52. The CCC would define the mass market to also include business customers served by less than four DS0 lines or equivalents, based on the "Four-Line Carve-Out Rule," first promulgated in the FCC's 1999 UNE Remand Order, *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Third Report and Order and Fourth

[2] Unbundling relief would also apply to businesses unfortunately caught in the overbroad sweep of the MDU Reconsideration Order. *Id.*

Further Notice of Proposed Rulemaking, FCC 99-238 (Nov. 5, 1999). CCC Brief at 38, 52-54. If the Department believes that it is appropriate to include some business customers in the category of "mass-market" customers for which fiber loop unbundling is not required, it should go no further than the CCC's suggested limit of three or fewer DS0 lines. In addition, if the Department is inclined to use Four-Line Carve-Out Rule to the set the boundary of the "mass market," then, consistent with that rule, unbundling relief should be limited to businesses with three or fewer DS0 lines in density zone 1 of the top 50 Metropolitan Statistical Areas. UNE Remand Order, ¶ 278.

Conversent's proposed definitions of FTTH and FTTC Loops properly limit the definitions to loops serving mass-market, residential customers. Verizon's definitions improperly expand both the definition and the unbundling relief for FTTH and FTTC loops. The Department should reject Verizon's proposal and adopt Conversent's. If, however, the Department is inclined to adopt the CCC's suggestion that the "mass market," for purposes of FTTH unbundling relief, should include business customers served by three or fewer DS0 lines or equivalents, the Department should go no further, and in addition, should specify that unbundling relief should include such business customers only in density zone 1 of the Boston MSA.[3]

Issue No. 16

Should Verizon be subject to standard provisioning intervals or performance measurements and potential remedy payments, if any, in the underlying Agreement or elsewhere, in connection with its provision of

a) unbundled loops in response to CLEC requests for access to IDLC-served hybrid loops;

[3] This will affect approximately six central offices in the metropolitan Boston area.

b) Commingled arrangements;
c) conversion of access circuits to UNEs
d) Loops or Transport (including Dark Fiber Transport and Loops) for which Routine Network Modifications are required;

[Verizon objects to sub-issues (e) and (f), below, and states that they fall outside the scope of this proceeding and are not appropriate for resolution in this proceeding.]

e) batch hot cut, large job hot cut and individual hot cut processes?
f) network elements made available under section 271 of the Act or under state law.

The Department should adopt Conversent's proposed section 3.7.2. This provision requires that Verizon's performance in connection with UNEs requiring routine network modifications shall be subject to standard provisioning intervals and performance measures and remedies. The Department should reject Verizon's proposed § 3.11.2 of Amendment No. 2, which provides that Verizon "may exclude" provisioning of UNEs involving routine network modifications from performance standards and remedies.

Verizon's contentions regarding exclusion of routine network modifications from performance standards and remedies provide no basis for the Department to accept Verizon's contract language. The authorities cited by Verizon actually provide support for the provisions proposed by Conversent and other CLECs requiring inclusion of routine network modifications in normal performance metrics. Specifically, Verizon says: "In any event, as the FCC noted in the *Verizon Massachusetts 271 Order*, the measurements adopted by New York and this Department involved routine and standardized processes that Verizon employs for various tasks." Verizon Brief at 103-04 (footnote omitted).

That is precisely what routine network modifications are. By definition, routine network modifications are *routine* and are typically performed by Verizon in serving its own retail customers. It is entirely appropriate, therefore, for routine network modifications to be included

in performance metrics and remedies. Indeed, if the C2C Guidelines and PAP excluded routine network modifications from performance metrics and remedies, Verizon certainly would have cited applicable provisions of the C2C Guidelines and PAP showing such exclusion. Verizon, however, has provided no such citation. That is because they do not exist. Indeed, Verizon typically performed routine network modifications at the time the C2C Guidelines and PAP were developed. *See* Conversent's Initial Brief at 31. Routine network modifications are included in the performance metrics and remedies, and the Department should so find.

Issue No. 21

How should the Amendment reflect an obligation that Verizon perform routine network modifications necessary to permit access to loops, dedicated transport, or dark fiber transport facilities where Verizon is required to provide unbundled access to those facilities under 47 U.S.C. § 251(c)(3) and 47 C.F.R. Part 51? May Verizon impose separate charges for Routine Network Modifications?

As the New York Public Service Commission recently held, and as the Public Utilities Commissions of Maine, Rhode Island, and other states held before that, the routine network modification requirements are not a change in law, but a pre-existing obligation of Verizon and other ILECs in the provisioning of unbundled network elements. Therefore, no amendment is necessary, and Verizon should perform all routine network modifications under its existing interconnection agreements without further delay. Further, in light of the fact that Verizon is seeking no additional charges for routine network modifications, there is no practical need for an amendment. The Department should order Verizon immediately to cease rejecting DS1 UNE loop orders where routine network modifications are required and to perform such modifications without delay under existing interconnection agreements, without insisting on an amendment and at no additional charge. *See* Conversent's Initial Brief at 32-35, 39.

If an amendment is required, then the Department should adopt Conversent's proposal, as Verizon's definition of routine network modifications is inappropriately narrow. *See id.* at 36-38.

The issue of separate charges for routine network modifications is moot. Verizon has admitted that it cannot prove its costs for routine network modifications. Importantly, Verizon admits that it cannot show that its alleged costs for routine network modifications are not already recovered in existing rates. *See* Verizon Letter dated March 1, 2005. But Verizon purports to reserve the right to impose routine network modification charges later, after completion of a future costs study, or now, if Department-approved rates for the particular activities exist. Verizon Brief at 126. Verizon's proposal is inappropriate and the Department should reject it.

First, Verizon's time to prove its costs is now, not in the future. The December 15 procedural order in this docket (at 31) required Verizon to prove the cost of routine network modifications in this proceeding. Finding itself unable to prove those costs, Verizon cannot impose any such costs, now or in the future, under the agreements that result from this arbitration.

Second, Verizon is wrong that it now may charge existing Department-approved rates for activities constituting routine network modifications. *There are no such rates.* The Department could not have been clearer when it said:

> Therefore, in order for us to approve *any* charges for routine modifications, we require Verizon not only to demonstrate that the proposed charges for routine modifications are just and reasonable, but also that there is no double recovery of costs in any charges it seeks to impose for routine modifications.

December 15 Procedural Order, at 31 (emphasis supplied). Because Verizon could not prove that there is no double recovery, there are no Department-approved rates for activities performed in connection with routine network modifications. It is that simple.

Therefore, the Department should adopt Conversent's proposed § 3.7.1.2, including the provision that routine network modification costs are already being recovered in the existing rates for UNEs under the agreements.

Supplemental Issue No. 1[4]

Should the Agreement identify the central offices that satisfy the FCC's criteria for purposes of application of the FCC's loop unbundling rules?

Supplemental Issue No. 2

Should the Agreement identify the central offices that satisfy the Tier 1, Tier 2, and Tier 3 criteria, respectively, for purposes of application of the FCC's dedicated transport unbundling rules?

Supplemental Issue No. 3

Should the DTE determine which central offices satisfy the various unbundling criteria for loops and transport? If so, which central offices satisfy those criteria?

Verizon justifies its refusal to include the list of wire centers that it claims are subject to the new non-impairment criteria for DS-1 and DS-3 loops and DS-1 and DS-3, and dark fiber dedicated transport by claiming that "if specific disputes do arise, they can be litigated on an individual carrier and individual central office basis as the FCC has ordered in ¶ 234 of the TRRO. Such an approach would be far more efficient than forcing litigation of such issues of such issues before any dispute arises." Verizon Brief at 143-44.

It is a novel argument indeed that piecemeal litigation is more efficient than a coherent, comprehensive examination of Verizon's methodology and the underlying data that went into the non-impaired wire center list. Carrier-by-carrier, central office-by-central office litigation cannot

[4] As set forth in the parties' supplemental issues statement, filed March 4, 2005.

help but be duplicative in the extreme, consuming vast and unnecessary amounts of the Department's and parties' time and resources.

The need for Department and CLEC scrutiny of Verizon's methodology and data was underscored by a Verizon industry letter dated April 15, 2005 (copy at Appendix 2). In that letter Verizon changed the classifications of three wire centers in New York. This letter, coupled with the March 24 letter concerning the Augusta, Maine wire center (Appendix 13 to Conversent's Initial Brief), casts further doubt upon the accuracy of Verizon's list. One wonders how many more times the wire center list will have to be corrected.

It was for precisely these reasons that the New York PSC required Verizon to tariff the list of non-impaired wire centers and to provide its staff with the underlying data. NY TRRO Tariff Order (Appendix 1), at 9-10. The NY PSC reasoned that the wire center classification process resulted in a "permanent classification [that] calls for the review and approval process inherent in tariffing." Thus, the PSC required Verizon to tariff the wire center list "to ensure adequate notice and process" and to provide an objective, bright-line effective date for future changes to the list and associated billing changes. *Id.* at 9. Similarly, the New Hampshire Public Utilities Commission has just opened a formal investigation into Verizon's wire center list. The N.H. Commission will investigate which wire centers in New Hampshire are affected by the FCC's new non-impairment criteria and what procedure the NH PUC should adopt for future determinations with respect to affected wire centers. DT 05-083, Order of Notice, at 2 (Apr. 22, 2005) (Copy at Appendix 3). The same considerations in favor of an objective list and Department and CLEC scrutiny of the list apply in Massachusetts.

Moreover, in its brief Verizon acknowledges that the piecemeal system for resolving disputes as to the wire center lists is a default system and the parties "'remain free to negotiate

alternative arrangements.'" Verizon Brief at 146, quoting TRRO ¶ 234. That is precisely what Conversent and other CLECs is trying to do — negotiate a more efficient, less resource-consuming alternative to the non-system that Verizon proposes. In Verizon's illogic, the fact that this alternative is optional is a reason not to adopt it. Far from being an undesirable provision, it is both appropriate and desirable to include the wire center lists. The Department should accept Conversent's provisions and reject Verizon's in this regard.

If the Department is unwilling to require inclusion of the wire center lists, at least it should require inclusion of a mechanism by which the parties can assess, at the outset of the contractual relationship, the accuracy of Verizon's list. To accomplish this aim, Conversent has proposed both substantive and procedural requirements, as follows:

> 3.8 Wire Center Lists.
>
> 3.8.1 Verizon Wire Centers that Verizon asserts currently meet the above Wire Center Criteria for high-capacity loops and Dedicated Transport as described in the preceding paragraphs of this Section 3, are attached as Appendix *** (hereinafter referred to as the "Wire Center List"). If the Wire Center List has not been independently verified by the Commission, the individual Wire Centers/routes listed are subject to challenge by Conversent in the following circumstances at a minimum: (i) when Conversent submits a request for conversion of special access facilities to a UNE or EEL; (ii) when Conversent submits a request for new Dedicated Transport or High-Capacity Loop UNEs; (iii) when Conversent receives a bill assessing transition rates for a particular loop or Dedicated Interoffice Transport UNE if Conversent asserts the charge is based upon an incorrect designation of a Wire Center; or (iv) after receipt of the information specified in Section 3.8.1.1 below.
>
> 3.8.1.1 If, as of the effective date of this Amendment, the Commission has not verified all or part of the Wire Center List applicable to Massachusetts, then Verizon shall, within 10 days after the effective date, provide Conversent with all information in its possession, custody, or control relating to the classification of the Massachusetts wire centers on the Wire Center List, including but not limited to i) the underlying ARMIS data, ii) the underlying data that was

used to calculate UNE loops leased by CLECs in the applicable wire centers , iii) additional information and description concerning the methodology that was used to determine the number of access lines in a given wire center, including how old the ARMIS and UNE loop data is, and what methodology was used to ensure that special access, entrance facilities (formerly a UNE), and OCN transport were not included in the loop data, (iv) to the extent that UNE loops leased by a CLEC typically result in a reduction in VZ business access lines, what adjustments were made to the ARMIS data to account for increases in UNE lines; (v) the identities of all fiber-based collocators in the wire center.

3.8.2 If a state verification process finds that the attached Wire Center List is in error, the Wire Center List shall be amended consistent with those findings.

3.8.3 If the Wire Center List has not been independently verified by the Commission and Verizon disagrees with any specific Conversent challenges to the Wire Center List, such disputes shall be resolved pursuant to the dispute resolution sections of this Amended Agreement. In any such dispute, Verizon shall have the burden of proof to show that the wire center satisfies the FCC criteria in every respect. If the result of a dispute resolution is that the attached Wire Center List is in error, the Wire Center List shall be amended, with retroactive application, consistent with that resolution.

3.8.4 Except for any corrections to the Wire Center List as a result of either state verification or Conversent challenges, or mergers or similar events that affect the number of fiber-based collocators in a wire center, the Wire Center List may not be changed from the attached list for the term of this Agreement.

3.8.5 After March 11, 2005, for requests for new unbundled loops or unbundled Dedicated Transport (including Dark Fiber Dedicated Transport), ordered either individually or as part of a combination or conversion request, Conversent shall engage in a reasonably diligent inquiry as to the status of the requested UNE. Conversent's placement of an order for such UNE shall constitute a self-certification, based on that inquiry, that to the best of Conversent's knowledge, the request is consistent with the requirements set forth in the *Triennial Review Remand Order*. Upon receipt of such a request, Verizon must immediately process the request, even if it challenges the request. Any Verizon challenges to Conversent's requests must be resolved *via* the

> dispute resolution procedures set forth in this Agreement. Any order submission that is consistent with the Wire Center List, as it may be amended as the result of a state verification process or challenges by Conversent, shall be deemed to have been submitted after a reasonably diligent inquiry pursuant to this section. If the Wire Center List has been independently verified by the Commission, all Conversent requests for unbundled access associated with unbundled loops and Unbundled Dedicated Interoffice Transport shall be consistent with that list.

Conversent Proposed TRRO Amendment, § 3.8. Adopting this provision will result in more certainty and less waste of resources through piecemeal litigation.

Conclusion

For the reasons stated above and in Conversent's initial brief, the Department should promote competition and the interests of the small businesses that Conversent primarily serves by adopting the interconnection agreement provisions proposed by Conversent.

April 25, 2005

Respectfully Submitted,

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Appendix 1 — NY PSC TRRO Decision 3/16/05

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

At a session of the Public Service Commission held in the City of New York on March 16, 2005

COMMISSIONERS PRESENT:

William M. Flynn, Chairman
Thomas J. Dunleavy
Leonard A. Weiss
Neal N. Galvin

CASE 05-C-0203 – Ordinary Tariff Filing of Verizon New York Inc. to Comply with the FCC'S Triennial Review Order on Remand.

ORDER IMPLEMENTING TRRO CHANGES

(Issued and Effective March 16, 2005)

BY THE COMMISSION:

INTRODUCTION

On February 10, 2005, Verizon New York Inc. (Verizon) filed proposed revisions to its P.S.C. No. 10 – Communications tariff. The changes, designed to implement the Federal Communications Commission's (FCC) Triennial Review Order on Remand (TRRO),[1] allow Verizon to discontinue providing various unbundled network elements and establish transition periods and price structures for existing services. Additionally, these tariff revisions incorporate previous Verizon commitments regarding

[1] In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, 2005 FCC Lexis 912 (released February 4, 2005) (TRRO). This action stems from the D.C. Circuit's March 2, 2004 decision which remanded and vacated several components of the FCC's earlier Triennial Review Order.

unbundled network switching which were made to the Commission in the April 5, 1998 Pre-Filing Statement of Bell Atlantic- New York in Case 97-C-0271 (PFS) in connection with Verizon's application to the FCC for relief from restrictions on providing long distance services. The tariff changes had an effective date of March 12, 2005. Inasmuch as they were not suspended, they are now in effect.

The TRRO addressed several impairment standards: mass market local circuit switching, DS1, DS3, and dark fiber transport, and high-capacity loops. Mass market local switching, and therefore the unbundled network element platform (UNE-P), was eliminated as a network element with no prospective obligation by ILECs to provide new UNE-P arrangements to competitive local exchange carriers (CLECs). In addition, a transition period for migration of CLECs' embedded customer base to new arrangements was established. During the transition period, the price for existing UNE-P lines would rise to TELRIC plus one dollar or the state commission approved rate as of June 16, 2004, plus one dollar, whichever was higher. In addition, the FCC found that CLECs are impaired without unbundled access to DS1 loops unless there are four or more fiber-based collocators and at least 60,000 business lines in the wire center. CLECs are impaired without unbundled access to DS3 loops unless there are four or more fiber-based collocators and at least 38,000 business lines in the wire center. Finally, CLECs are impaired without unbundled access to DS1 transport, except on routes connecting a pair of wire centers that both contain at least four fiber-based collocators or at least 38,000 business lines. The impairment standard for DS3 and dark fiber transport between wire centers was at least three fiber-based collocators or at least 24,000 business access lines. Transition periods were set for CLECs losing unbundled access to DS1 and DS3 and dark fiber transport and loops. The FCC also found no impairment as to dark fiber loops.

In addition to the tariff filing, on February 10, 2005, Verizon posted an industry notice on its website informing CLECs of its planned TRRO implementation and advising CLECs that no orders for new facilities or arrangements delisted as unbundled network elements by the FCC would be processed on or after March 11, 2005. CLECs

without alternative arrangements in place before March 11, 2005 would pay transitional rate increases allowed by the FCC for existing lines for delisted network elements. Verizon also offered an interim UNE-P replacement services agreement and, in its tariff, described below, committed to continue providing UNE-P in Zone 2 in New York pursuant to the PFS.

On February 25, 2005, comments were filed on the revised tariff, and related matters, by a coalition of CLECs: Allegiance of New York; A.R.C. Networks Inc. d/b/a InfoHighway Communications Corporation; BridgeCom International, Inc.; Broadview Network, Inc.; Trinsic Communications, Inc.; and XO New York, Inc. (Joint CLECs). A petition for emergency declaratory relief was filed on February 28, 2005 by MCI Metro Access Transmission Services (MCI Petition), which was subsequently withdrawn on March 10, 2005.[2] Comments on the tariff filing were also filed by Conversent Communications of New York, LLC (Conversent) on March 2, 2005. Verizon filed reply comments in support of its tariff on March 8, 2005. Additionally, on March 9, 2005, Covad Communications Company and IDT America Corp. (Covad) filed joint comments in support of the MCI Petition, as did AT&T Communications of New York, Inc., Teleport Communications Group, Inc., TC Systems, Inc., Teleport Communications New York, and ACC Corp. (AT&T).[3] Finally, on March 9, 2005, the Joint CLECs filed a Response to the Verizon Reply.

In this order we review the proposed tariff changes and filed comments. We first consider the tariff changes themselves and conclude that several modifications

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[2] Although MCI withdrew its petition for emergency declaratory relief, Covad and IDT America filed comments in support of that petition on March 9, 2005. Therefore, the issues raised in the MCI Petition will be considered.

[3] The Joint CLECs filed their comments in Case 04-C-0420 and MCI filed its comments in Case 04-C-0314. AT&T and Covad filed in support of the MCI Petition. As all comments deal, in pertinent part, with the tariff filing at issue in this case, the comments have been construed as also being filed in Case 05-C-0203.

are required. Apart from those modifications, we believe the tariff properly implements the TRRO. We also consider issues raised as to whether Verizon's tariff properly implements the PFS, and conclude that it does. Finally, we consider how the tariff changes affect Interconnection Agreements.[4]

TARIFF FILING

Local Switching and UNE-Platform Service

The TRRO allows for the phase-out of local circuit switching as an Unbundled Network Element (UNE) required to be provided by incumbent local exchange carriers. Thus, UNE-Platform service (UNE-P)[5] would no longer be available. Verizon's tariff revisions give CLECs one year (until March 11, 2006) to transition existing UNE-P customers to their own facilities or make other arrangements for local circuit switching. CLECs will pay the state approved Total Element Long Run Incremental Cost (TELRIC) rate as of June 15, 2004 plus one dollar. However, Verizon will continue to provide UNE-P arrangements to CLECs through December 21, 2007 in Zone 2 wire centers pursuant to the PFS.[6] New orders for UNE-P service will be accepted through December 21, 2005 for these wire centers only. After March 11, 2006, the rate for service in Zone 2 wire centers will transition to Verizon's applicable resale rate.

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[4] Although issues were raised regarding state unbundling authority and the effect of the Merger Order, we decline to deal with them in this tariff proceeding designed to implement the TRRO.

[5] UNE-P is a combination of network elements that includes local circuit switching, a switch port, and a subscriber loop.

[6] Zone 2 wire centers are those located in less densely populated areas and are identified in Appendix A to P.S.C. No. 10 – Network Elements tariff. The provision of local circuit switching in these wire centers is still subject to the FCC's four line carve out rule, which allowed Verizon to discontinue switching service for four lines and above (at a single customer location) from certain central offices in New York City.

Pricing proposal for Zone 2

Verizon's tariff provides that the PFS transitional pricing for Zone 2 wire centers will be in effect until March 10, 2006. During the interval of March 11, 2006 to December 21, 2007, the tariff indicates the price will be increased over time to rates equivalent to resale rates. However, no proposal for incremental price increases has been submitted. To ensure sufficient clarity exists for this transition, Verizon is required to file its proposal for price increases to resale rates for the Zone 2 wire centers by April 30, 2005.

Adding features

Joint CLECs object to Verizon's tariff on the grounds that it does not allow CLECs to submit feature change orders for their embedded UNE-P customers. Verizon responds that it does not object to making such changes, for as long as it is required to continue to maintain embedded platform arrangements. Verizon also published this clarification in "TRRO UNE-P Mass Market Discontinued Facilities Frequently Asked Questions" posted on its website. Thus, since the tariff does not preclude feature changes, no tariff revision is required.

Four Line Carve Out

Under the Triennial Review Order (TRO)[7], the FCC permitted ILECs to discontinue providing UNE-P for business customers with four or more lines (four line carve-out customers) or enterprise switching customers (those with local circuit switching

[7] Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-146, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶497 (footnotes omitted) (2003) ("TRO"); Errata, 18 FCC Rcd 19020 (2003), vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004), cert. denied 125 S.Ct. 313, 316, 345 (2004).

at DS1 and higher capacity levels). Last year, Verizon filed tariff revisions indicating its intent to bill for those services in a limited number of central offices at resale rates via a surcharge on tariffed TELRIC rates. However, Verizon chose not to file the rate for that surcharge for inclusion in its tariffs. Although the Commission is investigating whether the surcharge should be tariffed, it has permitted Verizon to depart from TELRIC pricing.

The Joint CLECs assert that because Verizon has not withdrawn its tariff for UNE-P service at TELRIC rates, enterprise switching and four line carve out customers are included in the embedded base of customers as of the date the TRRO was issued. Thus, the Joint CLECs argue that under the TRRO, CLECs are entitled to ongoing provision of this service until March 2006 at TELRIC plus $1, irrespective of the provisions of the earlier TRO order.

Verizon responds that switching for enterprise and four line carve out customers was eliminated as a UNE by the FCC, the courts and this Commission prior to the effective date of the TRRO. Tariff provisions were allowed to go into effect that removed the obligation to provide this UNE.

The FCC permitted ILECs to discontinue providing local circuit switching to enterprise and four line carve out customers at TELRIC rates. In Case 04-C-0861, the Commission is investigating the process by which Verizon revised its rates for a limited number of enterprise and four line carve out customers by imposing a surcharge without filing the rate in its tariff. While the process that Verizon utilized is under review, that does not require us to frustrate the clear goal of the FCC to remove the obligation to provide such services at TELRIC rates. Thus, the Joint CLECs argument is rejected.

DS1 and DS3 Loops and Transport

With respect to dedicated transport, Verizon's tariff provides that DS1 (24 voice channels per line) dedicated transport will no longer be available as a UNE at TELRIC prices where the connected wire centers (building where Verizon terminates the local wire loop) both have at least four fiber collocators or at least 38,000 business access lines. Additionally, DS3 (672 voice channels per line) and "dark fiber" (fiber that

has been lit by the CLEC using its own electronics, rather than the incumbent) transport will no longer be available as a UNE where the wire centers have at least three fiber collocators or at least 24,000 business lines. CLECs have until March 11, 2006 to transition existing lines from DS1 and DS3 dedicated transport, and until August 11, 2006 to transition from dark fiber transport. During the transition CLECs will pay 115% of the state approved TELRIC rate available on June 15, 2004.

Verizon's tariff provides that DS1 high-capacity local loops will no longer be available as a UNE at TELRIC prices where the local area is served by a wire center having at least 60,000 business lines and at least four fiber collocators. DS3 loops will no longer be available as a UNE where the wire center serving area (the area of a local exchange served by a single wire center) has at least 38,000 business lines and at least four fiber collocators. Dark fiber loops will no longer be available as a UNE, irrespective of the number of lines and collocators in the wire center. CLECs have until March 11, 2006 to transition from DS1 and DS3 UNE loops and until September 11, 2006 to transition from dark fiber UNE loops. During the transition CLECs will have to pay 115% of the state approved TELRIC rate available on June 15, 2004.

Negative construction

The Joint CLECs submitted specific objections to the language in Verizon's tariff revisions with respect to DS1 and DS3 loops and transport. For example, it took issue with language that identified when Verizon was not obligated to provide unbundled access to DS1 loops. The FCC rules were written in the affirmative, thus the CLECs argue that Verizon's tariffs should also be written in the affirmative to "define the rights of the CLEC that continue to obtain access to loops and transport". (Joint CLECs at p. 25.) Because the tariffs are written in the negative, identifying the circumstances under which Verizon is not obligated to provide various elements, the Joint CLECs contend that the CLECs' entitlement is left unclear.

Verizon's tariff identifies its obligations under the TRRO to provide UNEs in light of the applicable restrictions established by the FCC. That Verizon chose to state the obligation in the negative does not prejudice the CLECs. The CLECs failed to indicate any specific obligation for providing DS1 and DS3 loops and transport that the tariff would allow Verizon to evade. Verizon's tariff reasonably reflects the obligations set forth in the TRRO.

Certification of ineligible wire centers

Under the FCC's TRRO, CLECs are required to determine whether they can continue to place orders for loop or transport UNEs at TELRIC. Verizon has filed lists with the FCC that designate which wire centers meet the various criteria identified in the TRRO in order for CLECs to determine which dedicated transport and high –capacity loops will remain eligible as UNEs. Verizon's tariff requires CLECs, prior to submitting a request for UNE services, to review the lists in making their determinations as to whether the wire centers involved meet the applicable criteria for continued UNE eligibility. In the event an order is submitted for a location not eligible for the requested UNE (dedicated transport or high–capacity loop), the tariff provides that Verizon will institute the applicable dispute resolution process.[8] Under most of the interconnection agreements currently in effect, it is anticipated those disputes would be submitted to this Commission for resolution.

Conversent objects because Verizon does not include the list of wire centers for UNEs which are still available in the tariff. They contend that this does not meet the requirements of Public Service Law '92, which requires filing rates, charges,

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[8] The TRRO makes clear that an ILEC challenging a UNE request "must provision the UNE and subsequently bring any dispute regarding access to the UNE before a state commission or other appropriate authority". Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Order on Remand 2005 FCC Lexis 912, ¶234 (issued February 4, 2005).

terms, and conditions of the services Verizon provides. Additionally, the Joint CLECs contend that the list of ineligible wire centers that Verizon filed with the FCC must be vetted by the applicable regulatory authority and that Verizon must demonstrate changes in facts prior to amending such lists.

Verizon's response contends that Public Service Law does not preclude references to information available elsewhere and that it was not required to include the list of wire centers not qualifying for UNEs in its tariff. It analogizes to methods and procedures, as well as business rules, which CLECs are able to obtain via Verizon's website.

To ensure adequate notice and process, we will direct Verizon to file the list of exempt wire centers as part of its tariff. Under the TRRO, once a wire center is determined to be a Tier 1 wire center and thus exempt from provision of DS1 service as a UNE, that wire center is not subject to reclassification as a Tier 2 or Tier 3 wire center in order to make DS1 UNEs available at a later date. This permanent classification calls for the review and approval process inherent in tariffing. Also, wire centers can be added to the list or upgraded to a different classification. Without the official records provided through tariffing, effective dates could be questioned. If the affected wire centers are included in the tariff, then there will be specific effective dates that can be used in order to resolve disputes that are allowed under the TRRO. These could result in true-ups that can be done more efficiently with "bright line" effective dates.

Verizon will be required to amend its tariff to include the list of wire centers which no longer qualify for certain UNEs. The supporting documentation also should be provided to Staff for review and analysis.[9] Verizon, of course, can request confidential treatment under the Commission's rule. Any subsequent changes to the list

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[9] Documentation includes but is not limited to the number of business lines under the FCC's ARMIS reports and wire center inspection results.

should also be provided to the Commission via tariff filings with supporting documentation.

The Joint CLECs argue that the revised tariff provides Verizon a conclusive right to determine whether to fill a CLEC order for service, which goes beyond the FCC's order. It contends that the FCC clearly instructed CLECs to perform due diligence before submitting an order for service, but that the CLEC can weigh all evidence including that which contradicts Verizon's list of exempt wire centers.

Verizon contends that the issue is not whether it will process an order submitted by a CLEC, but whether a CLEC can submit an order in bad faith for a wire center that does not meet the objective criteria established in the TRRO. Verizon notes that it has made the lists publicly available and requested that any errors be brought to its attention.

We do not agree with the Joint CLECs' assessment regarding an ILEC's responsibility to provide access to a UNE when the order is submitted by a CLEC. A CLEC will not be considered to have performed its due diligence if it submits an order for a wire center that is on the Commission approved tariff list of exempt wire centers. Thus, we will not require a tariff amendment requiring Verizon to process orders that clearly conflict with the approved tariff list of exempt wire centers.

Backbilling

The Joint CLECs object to the tariff provision that, in the event the applicable dispute resolution process found a CLEC was not entitled to a UNE at a specific location, would allow Verizon to backbill for such service. The CLEC would be billed from the provision date of the service for the difference in price between the UNE rate and the rate that would otherwise be charged for the use of such element. The Joint CLECs contend that the TRRO does not provide for such backbilling and the applicable rate is not set forth in the tariff.

Verizon responds that backbilling would only be implemented after the appropriate dispute resolution process has found the CLEC was not entitled to UNE rates

in the wire center. It notes that the rate would be the applicable charge for a non-UNE equivalent for the transport or loop facility ordered.

The CLECs are correct that the TRRO does not speak to the ability of ILECs to bill for the foregone charges when a CLEC mistakenly requests access to a UNE in an ineligible rate center. However, the TRRO does not prohibit such a provision. Without such backbilling, there is little incentive for a CLEC to refrain from placing orders in an ineligible rate center. It is reasonable for Verizon to assert its right to backbill for services for which it would otherwise be entitled to charge a higher price. However, it is expected that backbilling can be mostly avoided by having Verizon's list of exempt wire centers vetted through the tariff process.

Post-transition arrangements

Verizon's tariff requires CLECs to place orders for conversion or discontinuance of UNEs in sufficient time according to applicable intervals. These intervals are referenced in the Carrier-to-Carrier guidelines that are available to all CLECs, and links to the appropriate information were provided in Verizon's January 6, 2005 compliance filing in Case 97-C-0139.

The CLECs argue that Verizon's tariff burdens CLECs in requiring them to place orders to transition services from UNEs early enough to ensure that orders can be fulfilled by the end of the FCC mandated transition periods. It contends more appropriate language would require Verizon to process orders placed for discontinuance or conversion of UNEs within the transition period and to continue TELRIC rates if Verizon is unable to fully process the order before the end of the applicable transition period. The CLECs also argue for grooming plans and efficient processes for conversions to be developed under interconnection agreements.

Verizon's response notes that its tariff prevents CLECs from extending the TRRO mandated transition periods. It points out that the tariff provides that if an order is placed with the applicable provisioning intervals, the service will not be disconnected.

The FCC set a transition period for all the tasks, both CLEC and ILEC, necessary for an orderly transition to be completed.[10] The TRRO does not allow a carrier placing an order one day before the end of the transition period to continue to get TELRIC pricing for the service because the ILEC was unable to process the order. The grooming plans and efficient processes for conversions under interconnection agreements recommended by the CLECs are not precluded by Verizon's tariff. However, if an order were placed for conversion of the service prior to the end of the transition period, but not within the applicable provisioning interval, requiring Verizon to continue to provide the service at resale rates would seem a reasonable alternative to disconnection. If no order is placed within the transition period, disconnection, as set forth in the tariff, is reasonable. Therefore, Verizon is directed to amend its tariff to allow for conversion to analogous service at the applicable resale rate in the event an order for conversion is placed before the end of the FCC mandated transition period, even if the order cannot be completed within the transition period. This is analogous to the conversion process for interoffice transmission facilities under an earlier Triennial Review Order that Verizon proposed in Case 03-C-1442.

Dark fiber loops

The Joint CLECs submit that Verizon's tariff should be amended to recognize Verizon's obligation to perform network modifications to provision DS1 and DS3 loops to include activating dark fiber strands under the same circumstances that Verizon would perform the work for its customers.

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[10] TRRO,¶¶142-145, 195 -198.

The Commission's February 9, 2005 order in Cases 04-C-0314 and 04-C-0318 directing Verizon to perform routine network modifications is sufficient to address this concern. In that order the Commission refrained from providing an exhaustive list of work that falls within the parameters of routine network modifications. Verizon is already on notice that it must perform such work for CLECs if it does so for its own customers. Thus, the Joint CLECs' contentions are not persuasive.

DS1 transport caps

The Joint CLECs and Conversent contend that Verizon's tariff unfairly restricts the number of DS1 circuits to 10 unbundled DS1 loops. They cite the TRRO provision that indicates that the 10-loop cap is only applicable where the FCC found non-impairment for DS3 transport.[11] Verizon responds that the TRRO and its attached regulation are inconsistent. We read the TRRO as a whole as intending to apply the 10-loop cap only where the FCC found non-impairment for DS3 transport. That is the most logical and reasonable interpretation of the FCC's action. Verizon is directed to modify its tariff accordingly.

Conclusion

The changes Verizon has made to its tariff implement the FCC's designated transition periods and price structures for dedicated transport, high capacity loops, and local circuit switching. In addition, Verizon has incorporated the additional commitments it made to the Commission to provide unbundled local circuit switching in the PFS, which go beyond the requirements of the TRRO. The proposed tariff revisions are reasonable and customers have been notified. Therefore, the tariff revisions listed on Appendix A should continue in effect. Verizon is directed to amend its tariff to allow for conversion of DS1 and DS3 loop and transport services to analogous services at the applicable resale rate in the event an order for conversion is placed before the end of the

[11] TRRO, ¶ 128.

FCC mandated transition period, even if the order cannot be completed within the transition period. Further, Verizon should amend its tariff to include the list of wire centers which no longer qualify for certain UNEs. The supporting documentation also should be provided to Staff for review and analysis. Verizon should amend its tariff concerning the 10-loop cap for DS1 services. Lastly, Verizon is required to file by April 30, 2005 its proposal for price increases to resale rates for the Zone 2 wire centers.

PRE-FILING STATEMENT

Background and Comments

On April 6, 1998, in connection with its application to provide in-region long distance service, Bell Atlantic-New York (hereinafter Verizon)**,** made additional commitments to the Commission, beyond those required by section 271, to ensure competition in New York.[12] With respect to combining network elements, Verizon committed to offer UNE-P for specified duration periods and "until such methods for permitting competitive LECs to recombine elements are demonstrated to the Commission. This commitment, when met, will permit competing carriers to purchase from Bell Atlantic-New York and connect all of the pieces of the network necessary to provide local exchange service to their customers."[13] In order to define methods available to CLECs to combine elements, the Commission instituted a proceeding.[14]

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[12] The major areas addressed were: (1) combining network elements; (2) terms and conditions enabling CLECs to connect their facilities to Verizon's; (3) testing Verizon's Operations Support Services (OSS) for pre-order, ordering, billing, customer migration, order changes, and maintenance and repair performance; and, (4) establishing an incentive system to maintain competition and service performance.

[13] Case 98-C-0690, Combining Unbundled Elements, Order Initiating Proceeding (issued May 6, 1998).

[14] Id.

Joint CLECs maintain that Verizon's Pre-filing Statement (PFS) imposes additional UNE-P provisioning obligations on Verizon in New York despite the TRRO's discontinuation of Verizon's section 251 obligations regarding UNE-P. Joint CLECs assert that the TRRO tariff filing does not reflect those PFS obligations which Joint CLECs maintain consist of providing UNE-P at TELRIC or cost-based rates until December 22, 2005 in Zone 2 and during a 2-year transition at a Commission approved increased price once the Commission finds that two conditions have been met: (1) assembly or a reasonable process enabling CLECs to combine unbundled loops; and, (2) a seamless and ubiquitous hot cut process. According to Joint CLECs, if the Commission found that both conditions had been met before December 22, 2003 in Zone 1 and December 22, 2005 in Zone 2, then the two-year transition for Zone 1 would end on December 22, 2005 and on December 22, 2007 for Zone 2. However, they claim the assembly and hot cut pre-transition conditions have not been met and, therefore, Verizon must continue to provide UNE-P at cost-based TELRIC rates in New York pursuant to the terms of the PFS.

In addition, Joint CLECs contend that the PFS requires Verizon to accept orders for new UNE-P lines after March 11, 2005 and until the two-year transition has ended. The TELRIC plus $1 dollar tariffed rate violates the terms of the PFS, according Joint CLECs, because it is not a Commission approved transitional rate.

The MCI Petition states that irreparable harm will occur if new UNE-P orders are not provisioned after March 10, 2005, and that the PFS requires Verizon to provide UNE-P in New York regardless of Verizon's federal obligations. The MCI Petition asserts that Verizon has not met the assembly condition, and therefore, the two-year transition has not begun. The MCI Petition further asserts that this failure was acknowledged by the Commission in Case 98-C-0690 when the Commission found "that only in conjunction with the continued provision of UNE combinations by Verizon pursuant to the Pre-filing Statement did Verizon provide recombination methods sufficient to support foreseeable competitive demand."

Verizon maintains that its TRRO tariff filing regarding PFS terms and rates is consistent with its PFS obligations. Verizon, the Joint CLECs and MCI agree that the PFS duration period for Zone 1 ended on December 21, 2003 and will end December 21, 2005 for Zone 2. However, Verizon contends that the transition period for each zone began automatically after the duration period ended, while Joint CLECs state that the beginning of the PFS transition period is contingent upon a Commission determination that two preconditions, assembly and hot cuts, have been fulfilled. As authority for a transition automatic start, Verizon cites a Commission Notice Requesting Comments in Case 04-C-0420 which describes Verizon's continuing obligation to provide UNE-P beyond the duration period: "[a]t the end of the duration period Verizon committed to continue the availability of the platform for an additional two years, albeit at a price that would increase to substantially the cost of resold lines."

Verizon asserts that no new customers may be added once the duration period has ended, that the PFS silence regarding new platform obligations, combined with fulfillment of the hot cut and assembly conditions, precludes any interpretation except that the transition period was intended to provide time for CLECs to find alternative arrangements for existing UNE-P customers.

As to meeting the PFS assembly and hot cut conditions, Verizon maintains that it has met both conditions and that Commission certification of that satisfaction, effected by a formal approval process, is not required by the PFS. According to Verizon, it has amply demonstrated the performance of both conditions to the Commission's satisfaction.

The price for new and existing UNE-P arrangements in Zone 2 is set at TELRIC plus one dollar during the remainder of that PFS duration period. Verizon states this FCC transition price is consistent with PFS obligations because the PFS requires UNE rates set by the Commission in accordance with federal law. According to Verizon, TELRIC plus one dollar is the price for UNE-P after March 11, 2005 until March 11, 2006.

Compliance With Assembly Condition

In Opinion 98-18,[15] the Commission examined Verizon's Pre-filing Statement combination obligations. The Commission concluded that "[a]fter exhaustive analysis of the strengths and shortcomings of these options [referring to methods CLECs could use to recombine elements themselves], consideration of competitors' proposals, and collaboration, we are requiring the provision of every technically feasible method available today. These methods, with certain modifications, are sufficient to support foreseeable competitive demand in a reasonable and non-discriminatory manner, in conjunction with its provision of element combinations pursuant to the Pre-Filing."[16] Verizon subsequently implemented its Assembly Products in tariffs, which were approved. Opinion No. 98-18 and Verizon's Assembly Products tariff were designed to permit CLECs to assemble or combine a Verizon loop and Verizon port (i.e., switch). Although the Commission's finding in Opinion No. 98-18 recognized that the assembly options would be offered in conjunction with the UNE platform, we find no reason to conclude that Verizon's assembly offerings would not continue to enable carriers to combine the Verizon link and port themselves. We also note the availability of commercial agreements for UNE-P replacement services for new UNE-P customers.[17]

In their March 9 Response, the Joint CLECs claim that Verizon has no functioning method that enable CLECs to combine a Verizon loop with a Verizon port as required by the PFS. The Joint CLECs claim that Verizon's assembly product focuses on combining a Verizon loop with a CLEC switch, not a Verizon switch. Such allegations

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[15] Opinion No. 98-18, Opinion and Order Concerning Methods for Network Element Recombination (issued November 23, 1998).

[16] Id. at 3.

[17] For example, see MCI's March 10, 2005 letter withdrawing its Petition for Emergency Declaratory Relief.

were made in the Joint CLEC original filing and accompanied by an offer of affidavits to demonstrate the alleged lack of assembly. The Joint CLECs did not, however, supply facts upon which we could conclude that Verizon does not provide a functioning method of assembly. In view of Opinion No. 98-18, which examined methods by which Verizon would combine Verizon loops and Verizon ports, and the Verizon Assembly Products tariff, which has been in effect since January 2001, conclusory contrary statements by the Joint CLECs are simply not adequate to demonstrate that Verizon has failed to provide a product that CLECs may or may not demand.

Compliance With Hot Cut Condition

Joint CLECs suggest that compliance with the PFS hot cut condition might be premised upon Commission review of Verizon's hot cut processes in Case 02-C-1425 with a concomitant transition date coinciding with issuance of the Order in August 2004. Verizon states that Commission review of hot cut processes in Case 02-C-1425 was just one determination regarding the efficacy of the hot cut process. In 2002, the Commission reviewed Verizon's hot cut process and concluded that the process was effective and "well-refined."[18] In addition, Verizon indicates Carrier-to-Carrier metrics demonstrate high levels of performance regarding Verizon's hot cut process[19] and ISO 9000 certification demonstrating conformance with best practices.[20]

We conclude that Verizon has had, since the end of the Zone 1 duration period in December 2003, a reasonable hot cut process. The loop migration process has performed well and has met our metrics. We find Verizon has met its PFS commitment for hot cuts.

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[18] Case 02-C-1425, Order Instituting Proceeding (issued November 22, 2002).

[19] See monthly C2C reports in Case 97-C-0139.

[20] Case 02-C-1425 Hearing Record, Tr. 53-55.

Demonstrated compliance with the assembly and hot cut conditions resolves the issue of Commission certification that the standards have been met and the timing of the transition period in Zones 1 and 2. Therefore, the two-year transition period in Zone 1 will end on December 21, 2005 and the two-year transition period in Zone 2 will end on December 21, 2007.

Transition Availability of UNE-P for New Customers

Joint CLECs maintain that the PFS' silence regarding availability of UNE-P for new customers during the two-year transition argues for an interpretation allowing CLECs to order new UNE-P arrangements while transitioning from the platform. Verizon maintains that the same silence precludes such interpretation.

There is no express term in the PFS authorizing CLECs to order new UNE-P services during the transition period. To imply such a term is unreasonable given the context and language of the PFS and that the transition period was intended to facilitate a smooth process for migrating existing UNE-P customers from the Verizon provided regulated platform. Adding customers while that transition is underway could undermine efforts for that smooth and seamless transition. Therefore, new UNE-P arrangements will not be available in Zone 1 pursuant to the PFS where the transition period ends on December 21, 2005 and will not be available in Zone 2 once the transition period begins on December 22, 2005.

Joint CLECs point out in their March 9 Response that Verizon's argument that the PFS doesn't apply to new customers during the two year PFS transition period is inconsistent not only with the PFS but with Verizon's own interpretation of the PFS. They note that in April 2004, in response to the Commission's March 29, 2004 Notice in Case 04-C-0420 (March 29 Notice) in connection with the USTA II vacatur of the FCC's Triennial Review Order, Verizon stated that the PFS transition charge for UNE-P should be implemented as a separate rate element to be applied to any new or existing UNE-P arrangement.

The key issue raised by the March 29 Notice was the establishment of a surcharge and not the more refined point of whether new customers would be served after

the expiration of the duration period. This plus the fact that the surcharge levels being considered in the March 29 Notice were higher than the FCC's $1 UNE-P surcharge, lead us to conclude that Verizon's April 2004 statement expresses a willingness to offer a higher rate for new customers, but is not a definitive statement concerning the scope of the PFS. Moreover, in its April 2004 pleading Verizon points to other PFS language indicating that its suppression of access charge billing will continue for *existing platforms after the expiration of the availability of new platforms.* This language more directly supports the distinction between the broad UNE-P commitment during the duration period and the more limited (i.e., existing customers only) commitment during the two year transition period following the duration period.[21]

In short, the PFS both expressly obligates Verizon to provide UNE-P for the four and six year duration periods[22] and describes the transition period as the period after the expiration of the availability of new platforms.[23] For all the reasons set forth above we reject the Joint CLECs' interpretation.

Transition Pricing

Zone 2

Joint CLECs claim that they are entitled to TELRIC or cost-based pricing in Zone 2 through December 21, 2005, the duration period for that zone. Verizon points to the fact that the Zone 2 duration period and FCC transition period run concurrently until December 21, 2005 and that the PFS transition period for Zone 2 runs concurrently with the FCC transition period after December 21, 2005 until March 11, 2006. Verizon

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[21] Even if the Joint CLECs' view of the scope of the PFS obligation were accepted, because the TRRO eliminated Verizon's obligation to provide new UNE-P arrangements, they would not be entitled to the FCC surcharge (TELRIC plus $1) for new UNE-P customers.

[22] Pre-filing Statement pp. 8-9.

[23] Id. at p. 8.

has filed a proposed FCC TRRO transition rate of TELRIC plus $1. After the FCC UNE-P transition ends on March 11, 2006, the price for UNE-P arrangements will increase to resale rates by December 21, 2007, the end of the transition period for Zone 2. This increase in price during the transition is consistent with the PFS.

Contrary to Joint CLECs' claim, the PFS does not entitle CLECs to TELRIC rates. No PFS citation has been offered to support the contention that UNE-P under the PFS can only be priced at TELRIC rates. When the PFS was filed in April 1998, the FCC's TELRIC rule was not in effect because it had been overturned by the 8th Circuit. We find that the $1 increase during the remainder of the duration period in Zone 2 is reasonable.

Zone 1

The two-year transition period in Zone 1 ends on December 21, 2005 and runs concurrently with the FCC transition period, which begins on March 11, 2005. Verizon, therefore, will apply the FCC TRRO transition rate of TELRIC plus $1 during that period and through the entire FCC transition period, rather than a higher PFS rate. After the FCC UNE-P transition ends, any remaining UNE-P arrangements will be discontinued or converted to alternative arrangements. Verizon's proposed increase in price during the Zone 1 transition is consistent with the PFS, which specifies that increases in transition rates are subject to Commission approval. The increased rate for the remainder of the transition period in Zone 1, TELRIC plus $1, is reasonable.

SECTION 271

Covad and IDT America maintain that Verizon has an obligation to continue providing access to UNE-P, apart from TRRO determinations, and cite 47 U.S.C. section 271 as authority. Although they admit that the FCC declined to require combining network elements no longer impaired pursuant to 47 U.S.C section 251, the MCI Petition contends that 47 U.S.C. section 202's nondiscrimination provisions provide a basis for combining non-impaired network elements since allowing only Verizon to

offer customers bundled switching would discriminate against CLECs. Joint CLECs also contend that Verizon's section 271 obligations remain despite the FCC's non-impairment findings and that it is essential that the PFS assembly condition be met in order to combine network elements.

In addition to jurisdictional arguments, Verizon cites the TRRO provision in which the FCC "declined to require BOCs, pursuant to section 271, to combine network elements that are no longer required to be unbundled under section 251.[24]

Given the FCC's decision to not require BOCs to combine 271 elements no longer required to be unbundled under section 251, it seems clear that there is no federal right to 271-based UNE-P arrangements.

INTERCONNECTION AGREEMENTS

Comments

Joint CLECs assert that specific provisions in their Interconnection Agreements regarding change of law and/or material change, which require bilateral negotiation, prohibit Verizon from unilaterally amending those Interconnection Agreements through its proposed tariff filing. In addition, Joint CLECs argue that the FCC's TRRO directs that changes should be implemented through the Interconnection Agreement amendment process and that Verizon's tariff filing is not a substitute for that process.

The MCI Petition states that Interconnection Agreements with Verizon cannot be abrogated by Verizon's unilateral tariff filing. Specifically, MCI states that until its Interconnection Agreement with Verizon is amended, Verizon must continue to provide UNE-P at cost based prices. The MCI Petition points to a prior instance in which Verizon sought to immediately discontinue providing services no longer required by the FCC, i.e. enterprise switching and four-line carve-out, in which Verizon acknowledged

[24] TRO ¶ 655, n. 1990.

that it had an obligation to follow change of law provisions in the MCI/Verizon Interconnection Agreement rather than summarily suspend provisioning of the service.

Conversent states that the TRO calls for implementing FCC required changes through the 47 U.S.C. Section 252 arbitration process and the TRRO mirrors that implementation and transition plan by also directing negotiated change. By precluding negotiation of key issues, e.g. wire centers where high-capacity loops and dedicated transport will or will not be provided, Conversent claims that Verizon's TRRO tariff filing usurps the process called for by the FCC in the TRRO.

AT&T contends that the specific change of law language in its Interconnection Agreements with Verizon preserves the status quo as to TRRO implementation until the Interconnection Agreements are amended. Similarly, Covad cites a section of its Interconnection Agreement that requires parties to negotiate changes in law which are then not effective unless executed in writing. According to IDT, its Interconnection Agreement specifies that regulatory and judicial changes must be negotiated and the status quo maintained during the pending negotiations. These provisions preclude Verizon from withdrawing network elements previously required pursuant to section 251, according to Covad and IDT.

Verizon states that the TRRO's directives take effect on March 11, 2005 and Interconnection Agreement terms "cannot override an FCC directive." The 12-month conversion process for UNE-P customers outlined in the TRRO, applies only to existing, not new customers, according to Verizon**.** Therefore, the FCC's decision to delist UNEs and specify that the transition period applies to embedded customers only expressly prohibits CLECs from ordering new UNE-arrangements after March 11, 2005.

In addition, Verizon argues that the FCC's intent to immediately effect discontinuation of certain UNEs is evidenced by the March 11, 2005 expiration date, of the FCC's Interim Rules Order, which imposed a temporary obligation to provide UNEs, and the effective date of the TRRO, which relieves Verizon and other ILECs of any obligation to provide certain UNEs, also March 11, 2005.

Verizon counters MCI's argument that the TRRO allows CLECs to order new UNE-P service until changes are made to existing Interconnection Agreements by pointing to the express prohibition in the TRRO against adding new UNE-P customers and the FCC's finding that continuing new UNE-P arrangements would "seriously undermine infrastructure investment and hinder the development of genuine facilities-based competition."[25]

Verizon states that it is not violating change of law provisions nor unilaterally amending Interconnection Agreements by filing its TRRO tariff because the change of law provisions invoked require compliance in the first instance with effective law, followed by a negotiation process to conform Interconnection Agreements. In addition, applicable law provisions in Verizon/CLEC Interconnection Agreements direct the CLECs to follow applicable law. In this instance, according to Verizon, applicable law eliminates its obligation to provide new UNE-P arrangements on or after March 11, 2005.

Discussion

The issue presented is whether our approval of the Verizon tariff and the clear statements of the TRRO regarding new customers for delisted UNEs satisfy or override change of law provisions in Interconnection Agreements regarding entitlement to ordering and receiving new network elements delisted in the TRRO, including UNE-P arrangements, after March 11, 2005.

The TRRO, in ¶233, makes reference to a negotiated process for implementing changes. Based on this language the TRRO should be implemented through interconnection agreements as necessary. However, for CLECs that have interconnection agreements with provisions allowing such amendment via tariff changes, changes will be effected via the tariff change process. The AT&T/Verizon

[25] TRRO ¶ 218.

Interconnection Agreement, for example, incorporates tariffs and envisions that tariff changes may flow through to the interconnection agreement.[26] In view of the notice provided by the tariff filing, the comment process thereon, and our review of both the tariff and comments, we find that this change process properly balances CLECs' interest in avoiding unilateral changes and the FCC's and Verizon's interest in avoiding unnecessary delay in implementing the TRRO's clear mandates. Therefore, the Commission declines to invoke its authority to prevent the tariff changes from flowing through to interconnection agreements, where provided for by interconnection agreements.

Further, to the extent other interconnection agreements do not incorporate tariff terms for UNE offerings and where changes must first be negotiated, we find that the change of law provision in those agreements should be followed to incorporate the transition pricing on delisted elements for the embedded base. Because the terms of the transition are clearly specified in the TRRO, this process should not be complex.[27] Moreover, to be consistent with the TRRO, the amendment should provide for a true-up to the TRRO transition rate for the embedded base of customers back to March 11, 2005, the effective date of the TRRO.[28]

Finally, with regard to new customers and interconnection agreements, based on our careful review of the TRRO, we conclude that the FCC does not intend that

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[26] See Case 01-C-0095, Joint Petition of AT&T Company of New York Inc., TCG New York, Inc. and ACC Telecom Corp. Pursuant to Section 252(b) of the Telecommunications Act of 1996 for Arbitration to Establish an Interconnection Agreement with Verizon New York Inc., Order Resolving Arbitration Issues (issued July 30, 2001) p. 8**.** Many of the CLECs that have filed comments in this proceeding have opted into the ATT/Verizon interconnection agreement.

[27] The FCC made clear that the UNE-P price should be increased by $1 and loops and transport in affected wire centers should be increased to 115% for the transition period.

[28] TRRO n. 408, n. 524, n. 630.

new UNE-P customers can be added during the transition period as the TRRO "does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to Section 251(c)(3)." TRRO ¶ 227. Although TRRO ¶233 refers to interconnection agreements as the vehicle for implementing the TRRO, had the FCC intended to use this process for new customers, we believe it would have done so more clearly. Paragraph 233 must be read together with the FCC directives that UNE-P obligations for new customers are eliminated as of March 11, 2005. Providing a true-up for new UNE-P customers would run contrary to the express directive in TRRO ¶227 that no new UNE-P customers be added.

CONCLUSION

Based on our review of the Verizon tariffs and the comments thereon, we conclude that several modifications to Verizon's tariff are required. Apart from these modifications, we believe the tariff properly implements the TRRO and Verizon's Pre-filing Statement commitments. Finally, we decline to prevent the tariff changes from flowing through to interconnection agreements that rely on tariffs for UNE terms.

The Commission orders:

1. The tariff revisions listed on Appendix A are allowed to continue in effect as filed, and newspaper publication of the changes proposed by the amendment and further revision directed by order clauses 2, 3, 4 and 5 are waived pursuant to §92(2) of the Public Service Law.

2. Within ten days of the issuance of this Order, Verizon New York Inc. shall file tariff amendments allowing for conversion of DS1 and DS3 loop and transport services to analogous services at the applicable resale rate in the event an order for conversion is placed before the FCC-mandated transition period, even if the order for conversion cannot be completed within the transition period.

3. Within ten days of the issuance of this Order, Verizon New York Inc. shall file tariff amendments to include the list of wire centers which no longer qualify

for UNEs. The supporting data and documentation upon which it based its determinations shall be provided to Staff for review and analysis at the same time.

4. By April 30, 2005, Verizon New York Inc. shall file its proposal for UNE-P price increases to resale rates for the period between March 11, 2006 and December 21, 2007 for the Zone 2 wire centers.

5. Within ten days of the issuance of this Order, Verizon New York Inc. shall file tariff amendments to apply the 10-loop cap for DS1 service only where there is non-impairment for DS3 transport.

6. The petitions for suspension, investigation and emergency relief are denied, except to the extent consistent with the foregoing Order.

7. This proceeding is continued pending compliance with the above ordering clauses following which it shall be closed.

By the Commission,

(SIGNED) JACLYN A. BRILLING
Secretary

Appendix A

Tariff pages in effect March 12, 2005:

PSC NY No. 10 – COMMUNICATIONS

Preface –
Original Page 8

Section 5 –
2nd Revised Page 1.2
Original Pages 1.3 through 1.12

Appendix D –
Original Page 1

Issued: February 10, 2005 Effective: March 12, 2005

Appendix 2 — Verizon Notice Letter re NY Wire Centers 4/15/05

Interconnection Services Policy & Planning
Wholesale Markets

Wholesale Markets
600 Hidden Ridge
HQEWMNOTICES
P.O. Box 152092
Irving, TX 75038

wmnotices@verizon.com

April 15, 2005

Scott Sawyer
Vice President-Regulatory Affairs
Conversent Communications of New York LLC
24 Albion Road Suite 230
Lincoln, RI 2865

Subject: **Notice of Changes to Triennial Review Order Wire Center List for New York**

This letter relates to the interconnection agreement between Verizon New York Inc. and Conversent Communications of New York LLC for the State of New York.

On March 2, 2005, in an industry notice posted on Verizon's wholesale website and by letter March 1, 2005, Verizon made available the wire center information it had filed with the Federal Communications Commission ("FCC") on February 18, 2005, that identifies the Verizon wire centers that satisfy the Tier 1 and Tier 2 criteria for eliminating unbundled dedicated transport and the wire centers that satisfy the non-impairment thresholds for DS1 and DS3 loops established in the *Triennial Review Remand Order*.[1] Verizon has recently identified a small number of inadvertent errors in that list. Accordingly, Verizon is revising the wire center list to account for those errors as follows:

(1) BFLONYEL (Buffalo-Elmwood Avenue): This wire center is deleted from the Tier 1 list of exempt offices and added to the Tier 2 list.

(2) BRWDNYBW (Brentwood): DS3 Unbundled Loop Services will no longer be offered from this wire center ("Wire Center Qualified" designation is changed from "No" to "Yes").

(3) NYCQNYJA (Jamaica): This wire center is deleted from the Tier 2 list of exempt offices and added to the Tier 1 list.

Verizon is taking steps to immediately correct this information, which is available on its wholesale website at: http://www22.verizon.com/wholesale/utils/attach-redirect/?target=/wholesale/attachments/verizonwirecentersexempt.xls.

Sincerely,

Jeffrey A. Masoner
Vice President – Interconnection Services Policy & Planning

VIA DHL Overnight

1 In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket 04-313 & CC Docket No. 01-338 (rel. Feb. 4, 2005) ("*Triennial Review Remand Order*" or "*TRRO*").

Appendix 3 — NH PUC DT 05-083 Order of Notice 4/22/05

THE STATE OF NEW HAMPSHIRE

PUBLIC UTILITIES COMMISSION

DT 05-083

ORDER OF NOTICE

The New Hampshire Public Utilities Commission (Commission) hereby gives notice that it is opening a formal investigation pursuant to RSA 365:5 in connection with certain provisions of Tariff No. NHPUC 84 of Incumbent Local Exchange Carrier (ILEC) and Regional Bell Operating Company (RBOC) Verizon NH. The provisions at issue are contained in certain tariff revisions filed by Verizon on February 22, 2005 in Docket No. DT 05-034.

Specifically, the Commission will investigate issues related to Verizon's obligation as an ILEC to provision certain unbundled network elements (UNEs) -- DS1 loops, DS3 loops and dedicated high-capacity transport facilities (including dark fiber transport) -- to Competitive Local Exchange Carriers (CLECs) pursuant to Section 251 of the Telecommunications Act of 1996, 47 U.S.C. § 251, and the Federal Communications Commission's *Triennial Review Remand Order* (TRO Remand Order), 2005 WL 289015 (F.C.C., Feb. 4, 2005). The Commission intends to conduct its investigation as an adjudicative proceeding pursuant to RSA 541-A:31 and N.H. Code Admin. Rules Part Puc 203.

The TRO Remand Order makes clear that Verizon remains obliged to provision these UNEs under section 251 at some of its wire centers but not others and requires CLECs to determine which wire centers meet specific criteria set forth in the TRO Remand Order. The TRO Remand Order provides a formula and method for how to determine which wire centers qualify with regard to newly requested services but does not provide a method of how to deal with already

provisioned services other than to direct the parties to negotiate changes in their interconnections agreements. Additionally in New Hampshire, the Commission must deal with changes to the Verizon tariff as a result of the TRO Remand Order rather than just interconnection agreements. For that reason, we find a formal investigation is warranted. The purpose of the investigation is to determine which wire centers in New Hampshire are affected and what procedure the Commission should adopt for future determinations with respect to affected wire centers.

The Commission additionally reserves the right, if necessary, to determine in this proceeding whether, notwithstanding the requirements of section 251 and the TRO Remand Order, Verizon remains obliged to provision the affected UNEs at any New Hampshire wire centers by virtue of Verizon's status as an RBOC that has obtained authority under section 271 of the Telecommunications Act, 47 U.S.C. § 271, to provide interLATA long-distance service in New Hampshire. *See* Order No. 24,442 (March 11, 2005) entered in Docket Nos. DT 03-201 and DT 04-176.

Based upon the foregoing, it is hereby

ORDERED, that a Prehearing Conference, pursuant to N.H. Admin. Rules Puc 203.05, be held before the Commission located at 21 S. Fruit St., Suite 10, Concord, New Hampshire on May 25, 2005 at 10:00 a.m., at which interested parties and the Commission Staff will provide a preliminary statement of its position with regard to the investigation and any of the issues set forth in N.H. Admin Rule Puc 203.05(c) shall be considered; and it is

FURTHER ORDERED, that Verizon NH is a mandatory party to this proceeding; and it is

FURTHER ORDERED, that, immediately following the Prehearing Conference, Verizon, the Staff of the Commission and any Intervenors hold a Technical Session to review the issues in the investigation; and it is

FURTHER ORDERED, that pursuant to N.H. Admin. Rules Puc 203.01, Verizon shall notify all persons desiring to be heard at this hearing by publishing a copy of this Order of Notice no later than May 4, 2005, in a newspaper with statewide circulation or of general circulation in those portions of the state in which operations are conducted, publication to be documented by affidavit filed with the Commission on or before May 25, 2005; and it is

FURTHER ORDERED, that pursuant to N.H. Admin Rules Puc 203.02, any party seeking to intervene in the proceeding shall submit to the Commission an original and eight copies of a Petition to Intervene with copies sent to Verizon and the Office of the Consumer Advocate on or before May 20, 2005, such Petition stating the facts demonstrating how its rights, duties, privileges, immunities or other substantial interest may be affected by the proceeding, as required by N.H. Admin Rule Puc 203.02 and RSA 541-A:32,I(b); and it is

FURTHER ORDERED, that any party objecting to a Petition to Intervene make said Objection on or before May 25, 2005.

By order of the Public Utilities Commission of New Hampshire this twenty-second day of April, 2005.

Debra A. Howland
Executive Director & Secretary

Individuals needing assistance or auxiliary communication aids due to sensory impairment or other disability, should contact the Americans with Disabilities Act Coordinator, NHPUC, 21 S. Fruit St., Suite 10, Concord, New Hampshire 03301-2429; 603-271-2431; TDD Access: Relay N.H. 1-800-735-2964. Notification of the need for assistance should be made one week prior to the scheduled event.